

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

**INTERNATIONAL CONVERTER, INC.
a wholly-owned subsidiary of
PACKAGING DYNAMICS, LLC¹**

Employer

and

Case No. 8-RC-16308

**UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC, LOCAL NO. 4836²**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The name of the Employer appears as amended at hearing.

² The name of the Petitioner appears as amended at hearing.

³ The Employer has filed a brief which has been carefully considered.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time production and maintenance employees employed by the Employer at its 17153 Noble County Road 57, Caldwell, Ohio facility, including shipping employees, truck drivers, and laboratory technicians, but excluding managerial employees, confidential employees, and all office clerical employees, professional employees, guards and supervisors as defined in the Act.

There are approximately 78 employees in the unit sought.

The Petitioner seeks to represent a unit of “all full time and regular part time production and maintenance employees employed by the Employer at its Caldwell, Ohio facility, including shipping employees, truck drivers, but excluding laboratory technicians, confidential employees and office clerical employees, and all professional employees, guards and supervisors as defined in the Act.”⁴ The Employer contends that the unit sought should not include laboratory technicians (also referred to as QC technicians) because they are supervisors within the meaning of Section 2(11) the Act. The Petitioner is in agreement with the Employer’s assertion that the laboratory technicians should be excluded from the unit.

I have been administratively advised that the Employer refused to enter into a stipulated election agreement excluding the laboratory technicians as statutory supervisors because it was concerned about the effect of such a stipulation on any future unfair labor practice proceeding.

The Employer also refused to enter into a stipulation at hearing excluding the laboratory technicians from the unit as supervisors for the same reason. Rather, the Employer asserted it desired to present evidence in order to obtain a finding regarding their status. Under these circumstances, it was necessary to take record evidence regarding the supervisory status of these individuals, in order to determine whether it is appropriate to accept the Parties' agreement excluding them from the unit as supervisors.

Thus, the issues before me are: (1) whether laboratory technicians are supervisors within the meaning of Section 2(11) of the Act, and (2) if they are not supervisors, whether they should be included because they share a community of interest with the other employees in the proposed unit.

The Employer is a Delaware corporation engaged in the lamination of paper and foil products at its Caldwell, Ohio facility, the only facility involved herein. The Employer produces laminated paper products for customers such as Arby's and other food chains or restaurants. The Employer's facility operates five days a week, 24 hours a day on three shifts (the first shift operates from 7:00 a.m. to 3:00 p.m.; the second shift from 3:00 p.m. to 11:00 p.m.; and the third shift from 11:00 p.m. to 7:00 a.m.). The first and third shifts have one supervisor and the second shift has two supervisors. One of the second shift supervisors and the midnight shift supervisor report to the lamination production manager. The day shift supervisor and the other second shift supervisor report to the food service production manager.

The Employer employs three laboratory technicians or QC technicians who are at issue: Bill Waller (first shift), Donny Spicer (second shift), and Travis Danford (third shift). The Employer's plant manager testified that the laboratory technicians spend 50 % of their time in

⁴ The petitioned-for unit appears as amended at hearing.

the laboratory and 50% on the plant floor performing visual audits or checks on the product. The laboratory technicians possess the authority to shut down the production operation on their own if they determine there is a defect in the production process. They report to the Employer's technical manager, Debraj Banerjee. The production and maintenance or "shop" employees report to their respective shift supervisors.

Before becoming laboratory technicians the three individuals in question previously worked in the production and maintenance unit. The laboratory technicians are salaried and have an annual review which results in a "merit" raise or increase on March 1st of each year. The shop employees are hourly paid and are reviewed annually, but their reviews result in "general," as opposed to "merit," raises which occur on April 1st of each year. All employees receive the same health and fringe benefits and the same bonuses. While no laboratory technicians are assigned to perform production work, Plant Manager Jeffrie D'Costa⁵ testified that the laboratory technicians (like the production managers and supervisors) will help in the production process when needed.

D'Costa testified that for a total of approximately ten weeks out of a year, the laboratory technicians fill in for the supervisors and perform their duties. The record does not reveal, however, that the laboratory technicians exercise independent judgment in the exercise of any of the supervisors' duties.

Laboratory technicians do not possess the authority to hire or discharge employees. D'Costa testified that laboratory technicians have the authority to recommend the discharge of employees, but none of them have ever made such recommendations. He also testified that laboratory technicians have the authority to recommend the hire of employees, but he

⁵ Plant Manager Jeffrie D'Costa was the only witness to testify at the hearing.

acknowledged that some recommendations have been rejected by the Employer. Laboratory technicians do not address employee grievances or complaints, assign work or overtime hours to employees, lay off employees, grant pay raises or reward employees, and they do not have the authority to transfer employees.

Laboratory technicians have the authority to bring quality control problems to the attention of the supervisors, but they do not have authority to discipline employees. The Plant Manager testified that one employee was disciplined regarding a quality control problem which was reported to management by one of the laboratory technicians. However, there is no evidence that the laboratory technician effectively recommended such discipline or played any role in the disciplinary process other than reporting the problem. Laboratory technicians, like all employees in the plant, have input in the production process. Laboratory technicians have the authority to make “small purchases” for the Employer, while hourly employees do not.

D’Costa testified that laboratory technicians do not play a role in evaluating labor policy, but he asserted that the Employer seeks input from the laboratory technicians regarding the promotion of hourly employees. The extent of such alleged input and the consideration the Employer gives to such input is not reflected in the record. As an example, D’Costa testified that four current employees applied for an open “laminator” position and in the monthly management meeting he “polled the entire group” regarding the eligible employees. However, he was unable to cite any specific examples of specific recommendations by laboratory technicians regarding the promotion of employees.

Laboratory technicians attend the Employer’s monthly management meetings which involve company financial reviews and review of production statistics.

Based on the record evidence, I am unable to accept the Parties agreement that the laboratory technicians are supervisors within the meaning of the Act. To the contrary, I find that they are not supervisors within the meaning of Section 2(11) of the Act.

Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment.

It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, provided that the authority is exercised with independent judgment on behalf of management and not in a routine manner. **Clark Machine Corporation, 308 NLRB 555 (1992); Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986).** It is also well established that the burden of proving supervisory status rests on the party asserting such status. **NLRB v. Kentucky River Community Care, Inc., 121 S.Ct. 1861 (May 29, 2001); Billows Electrical Supply of Northfield, Inc., 311 NLRB 878 (1993).** The Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. **Azusa Ranch Market, 321 NLRB 811, 812 (1996); Hydro Conduit Corp., 254 NLRB 433, 437 (1981).**

In addition to the enumerated powers in Section 2(11) of the Act, the Board may also look to certain other factors as evidence of supervisory status, e.g., the individual’s attendance at supervisory meetings, authority to grant time off to other employees, and the ability to evaluate employees. See **Flexi-Van Service Center, 228 NLRB 956, 960 (1977).** Such secondary

indicia alone, however, without any of the primary indicia found in Section 2(11) of the Act, cannot prove supervisory status. **J.C. Brock Corp.**, 314 NLRB 157, 159 (1994); **Hausner Hard-Chrone of KY, Inc.**, 326 NLRB 426, 427 (1998); See also **Bowne of Houston**, *supra* at 1225.

In applying the traditional criteria for the establishment of supervisory status to the facts of the instant case, I find that the burden of proving that the laboratory technicians are supervisors within the meaning of Section 2(11) of the Act has not been met.

The record in this case reveals that laboratory technicians do not have the authority to hire employees. Despite the fact that D'Costa stated laboratory technicians have the authority to recommend the hire of employees, there is no evidence that those alleged recommendations are effective or have resulted in the hiring of employees. In fact, the record reveals that some of the alleged recommendations have been rejected by the Employer. The record also reveals that laboratory technicians do not possess the authority to discharge employees or to effectively recommend such employment actions. D'Costa testified that laboratory technicians have the authority to recommend the discharge of employees, but the record reveals that none of them have ever made such recommendations. Thus, there is no evidence to indicate that laboratory technicians possess the authority to effectively recommend the discharge of employees. The record further reveals that laboratory technicians do not have the authority to transfer, suspend, layoff, recall, promote, assign or reward employees, responsibly direct employees, or to adjust employee grievances.

In addition, the record discloses that laboratory technicians do not have the authority to discipline employees or to effectively recommend discipline. The laboratory technicians have authority to report quality control infractions, but there is no evidence that they discipline or

effectively recommend discipline for employees. I find that any role the laboratory technicians have in the Employer's disciplinary process is reportorial in nature. The mere factual reporting of employee infractions that do not automatically affect job status or tenure does not constitute supervisory authority. **The Ohio Masonic Home, Inc., supra; Passavant Health Center, 284 NLRB 887, 889 (1987); Azusa Ranch Market, supra at 813.** In addition, the Board has held that even in circumstances in which quality control inspectors are in a position to criticize unit employees' work or cause disciplinary action to be taken against them, such apparent authority without evidence of actual exercise of the authority is an insufficient reason to exclude them from a unit. **Blue Grass Industries, 287 NLRB 274, 299 (1987); Modine Mfg. Co., 180 NLRB 472 (1969).**

The Employer argues, however, that the laboratory technicians are supervisors within the meaning of the Act because they collectively act as shift supervisors for a total of approximately ten weeks a year, in the absence of the shift supervisors who are on vacation. The record, however, does not reveal that laboratory technicians possess any indicia of supervisory authority while acting in those supervisory positions, or that their substitutions are regular and substantial. The determination of whether individuals are supervisors cannot be based on theoretical expressions of the responsibility and duties of the individuals, but rather must be based on their actual duties. **Ross-Porta-Plant, Inc., 166 NLRB 494, 496 (1966), enfd. 70 LRRM 2005 (5th Cir. 1968).** Thus, the mere use of a title or grant of "paper authority" does not make an employee a supervisor. **Sunset Nursing Homes, Inc., 224 NLRB 1271, 1273 (1976); The Connecticut Light and Power Company, 121 NLRB 768 (1958).**

In addition, the Board has held that an employee who substitutes for a supervisor may be deemed a supervisor only if that individual's exercise of supervisory authority is both regular

and substantial. **Brown & Root, Inc.**, 314 NLRB 19, 20-21 (1994). Substitution limited to such periods as vacations, appointments, or other unscheduled occasions is insufficient to establish supervisory status. **The Bakersfield Californian**, 316 NLRB 1211, 1219, 1220, 1222 (1995); **Brown & Root, Inc.**, *supra*. The record in this case does not establish that the laboratory technicians' assumption of supervisory duties involve the exercise of any indicia of supervisory authority or that it is anything more than insubstantial, irregular, and sporadic. Thus, I find that the substitution of laboratory technicians for supervisors ten weeks a year is insufficient to establish that they are supervisors within the meaning of the Act. **The Bakersfield Californian**, *supra*; **Brown & Root**, *supra*; **Hexacomb Corp.**, 313 NLRB 983 (1994).

In the absence of evidence that the laboratory technicians in question possess any of the enumerated categories of authority in Section 2(11) of the Act – the primary indicia of supervisory status – there is no basis to consider so-called secondary indicia, such as the individual's attendance at supervisory meetings, the employee-supervisor ratio if they are not deemed supervisors, or pay differentials between them and others in their departments. **J.C. Brock Corp.**, *supra*; **Hausner Hard-Chrone of KY, Inc.**, *supra*; See also **Bowne of Houston**, *supra*.

Thus, based on the above, I find, contrary to the agreement of the Parties, that the laboratory technicians are not supervisors within the meaning of Section 2(11) of the Act.⁶

⁶ I note that, in addition to arguing that the laboratory technicians are supervisors within the meaning of the Act, the Employer also contends in its brief that the individuals at issue are “managerial” and that they should be excluded on that basis. The Board, with Supreme Court approval, has long defined managerial employees as those who:

[F]ormulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. **General Dynamics Corp.**, 213 NLRB 851, 857 (1974)]; **NLRB v. Yeshiva University**, 444 U.S. 672, 682 (1980).

I now must determine whether the laboratory technicians should be included in the petitioned-for unit. In making unit determinations the Board considers whether employees share a community of interest. The factors considered include employees' wages, hours, and working conditions; qualifications, training, and skills; frequency of contacts and extent of interchange with each other; frequency of transfers into and out of the unit sought; common supervision; degree of functional integration; collective-bargaining history; and area bargaining patterns and practices. **Kalamazoo Paper Box Corp., 136 NLRB 134 (1962)**. No one factor has controlling weight. **Airco, Inc., 273 NLRB 348 (1984)**.

The record establishes that laboratory technicians receive the same benefits as other production and maintenance employees and they have regular contact with the shop employees in performing inspections of the production process. They also work the same three shift schedules as the production employees, work in the same building, and play a vital role in the production of the Employer's product. The Board has held that "employees who ensure that production is of a uniform high quality are an integral part of the overall manufacturing process." **Blue Grass Industries, supra at 299; Owens-Illinois, Inc., 211 NLRB 939, 941 (1974)**. Although the important criterion is community of interest with bargaining unit members rather than the relationship of the job to the production process, the importance of quality control jobs in the production process is a further consideration when a community of interest has already been demonstrated. **Blue Grass Industries, supra at 299; Avon Products, 250 NLRB at 1479, 1483-1484 (1980)**. I note that the Parties stipulated at hearing that, in the event that I find the laboratory technicians are not supervisors, they should be included in the unit. I find that the

I find that the record evidence does not establish that the laboratory technicians formulate management policy or that they exercise discretion in the performance of their jobs independent of the Employer's established policy. Accordingly, I also conclude that the laboratory technicians are not managerial employees.

record supports, and I hereby accept, that stipulation of the Parties. Thus, I conclude that the laboratory technicians have a sufficient community of interest with other employees to warrant their inclusion in the unit found appropriate herein.

Finally, I note that the Parties stipulated that three production and maintenance employees on disability at the time of the hearing – Carl Bennett, Doug Gibson, and Ed Schafer – should be eligible to vote in the election because they have a reasonable expectancy of recall to work in the foreseeable future. Since there is no record evidence to the contrary, I accept the Parties' stipulation and find that they are eligible to vote in the election directed herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Steelworkers of America, AFL-CIO, CLC, Local 4836**.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by January 31, 2002.

Dated at Cleveland, Ohio this 17th day of January 2002.

/s/ John Kollar

John Kollar
Acting Regional Director
National Labor Relations Board
Region 8

177-8560-0000-0000